C. The Circuits Disagree That Preventing Litter Is a Valid Governmental Function.

The Sixth and Eighth Circuits also disagree on whether or not littering, the placing of material on a person's private property is, in and of itself, cause to prohibit handbilling on unoccupied private vehicles parked on public property. *Krantz,* 160 F.3d at 1220. *Jobe,* 403 F.3d at 268. *Krantz,* 160 F.3d at 1218, failed to address the private property rights of the vehicle owners to be "let alone", merely assuming that a private vehicle on the public streets was transformed into a public forum.

The Sixth Circuit held that "Placing unrequested fliers on a car windshield (or some other part of the car) shares as many qualities with littering as placing the fliers on the front lawn of a residence, on the top of a boat or for that matter on top of any piece of private property that is not otherwise designated by intent or usage to receive and hold literature distributed by others." *Jobe,* 409 U.S. at 273-274.

This Court need not grant review to resolve this conflict between the Circuits. Only the analysis of the Sixth Circuit correctly applied the precedent set by this Court to the ordinance before it.

II. THE SIXTH CIRCUIT CORRECTLY APPLIED *TAXPAYERS FOR VINCENT* AS WELL AS THE PRECEDENT SET IN OTHER CASES BY THIS COURT.

Leonard Jobe attempts to distinguish the Sixth Circuit's following of this Court's analysis of where and how communications may be regulated in *Taxpayers for*

Vincent because following that precedent is fatal to his case.

A. A Private Vehicle on a Public Street Is Not a Public Forum.

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communication thoughts between citizens, and discussing public questions." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). The Eighth Circuit, in *Krantz,* never explained why private vehicles were a public forum, only that the parties conceded that public streets and parking lots are public forums. *Krantz*, 160 F.3d at 1218.

Even if, *arguendo*, being parked on a public street somehow converts a private auto into some type of public forum it is, at the very worst from an owner's standpoint, a limited public forum. " . . . it is clear that the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government. . . . Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Taxpayers for Vincent,* 466 U.S. at 814.

This Court in *Taxpayers for Vincent*, 466 U.S. at 814, as quoted in *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994) " . . . rejected as 'misplaced' respondents' reliance on public forum principles, for they had 'fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for

public streets and parks.'" Neither *Krantz*, nor any other case has identified any "traditional right of access" to private motor vehicles, or for that matter their progenitors: privately owned horses, wagons, carriages or bicycles. Handbilling is far from cutting edge technology and motor vehicles are only the latest step in our "mobile society."

"The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990), citing *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 808 (1985).

This Court, in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992), discussed the difference between private and public ownership of transportation facilities, concluding that " . . . neither by tradition nor purpose can the terminal be described as satisfying the standards we have previously set out for identifying a public forum." When coming to this conclusion this Court noted that " . . . much of the evidence is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had private ownership." *Lee*, 505 U.S. at 681.

Since private motor vehicles are privately owned, they, at the very least, do not rise above the level of limited or nonpublic forum. As such, any restriction of a limited or non-public forum need only be "reasonable; it need not be the most reasonable or the only reasonable limitation . . . ". *Lee*, 505 U.S. at 683, citing *Kokinda*, 497 U.S. at 730.

Despite this Court's guidance in *Taxpayers for Vincent, Kokinda, Lee,* and *Cornelius,* the Eighth Circuit in *Krantz*,

160 F.3d at 1220, held that a handbiller cannot be restrained from publishing his speech on private vehicles parked on public property, unless the owners post a sign prohibiting handbilling. Nowhere is this leap from completely private ownership to a public forum under the First Amendment supported except by *Krantz*.

The *Krantz* decision results in an oblivious vehicle owner, because of the absence of a "No Soliciting" sign, being responsible for littering if the handbill blows off before the owner of the vehicle returns. The result is absurd.

B. Preventing Litter Is a Valid Governmental Function.

Keeping the streets clean and free of debris is a traditional government interest and one that many communities take seriously enough to purchase street sweepers and to use valuable and expensive employee time and effort to ensure is done properly. This Court in *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451 (1938), while striking down an ordinance for being too broad because it covered every sort of circulation, noted that it found the ordinance offensive because: "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse **or littering of the streets**. [Emphasis added] The City of Catlettsburg's ordinance is precisely what was contemplated by this Court in *Lovell*.

"A distributor of leaflets has no right simply to scatter his pamphlets in the air – or toss large quantities of paper from the window of a tall building or a low flying airplane.

Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." *Taxpayers for Vincent*, 466 U.S. at 810.

The Sixth Circuit in *Jobe* noted that: "Placing unrequested leaflets on privately owned cars, moreover, amounts to a form of littering no less than placing leaflets on privately owned lawns or directly on the public streets. There is nothing special about a car – or for that matter, about a bicycle, a baby stroller, an individual's back or a lawn – that invites others to place leaflets or advertisements on it without the owner's consent." *Jobe,* 409 F.3d at 270.

"Here, the substantive evil – visual blight – is not merely a possible by-product of the activity, but is created by the medium of expression itself."[1] *Taxpayers for Vincent*, 466 U.S. 809-810. When depositing leaflets on private autos, the substantive evil – litter – is not merely a possible by-product of the activity, but is created by the medium of expression itself. Litter is the placing of substances on the property of another, without the other's prior consent to accept the material and consequent duty to dispose of it.

This Court in, *Taxpayers for Vincent,* 466 U.S. at 817, held that " . . . if the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, 'then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.' [Citing *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 508 (1981)] . . . We hold that on this record these

[1] Justice Black of this Court (dissenting in part) upholding the ban on posters on light poles.

interests are sufficiently substantial to justify this content-neutral, impartially administered prohibition against the posting of appellees' temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'". Citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The Sixth Circuit merely followed this Court's precedent in its analysis.

C. The Sixth Circuit Gave Handbilling the Protection Demanded By Precedent Finding The Restriction on Handbilling to be Narrowly Tailored.

Even assuming, *arguendo*, that private vehicles on public streets are public fora, the Catlettsburg ordinance still meets the tests of being narrowly tailored to serve a compelling state interest and does not unreasonably limit alternate avenues of expression set forth by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

There are four prongs to the test set forth in *Ward* and expanded in *Hill*, 530 U.S. at 703. In both *Krantz* and *Jobe* the ordinances were content neutral, as they both addressed all handbills, whether they were political, religious, or commercial in nature, which satisfies the first prong of the test.

This Court in *Hill*, applying the *Ward* test, explained what is "narrow tailoring", significant government interests, and alternative channels of communication. The Catlettsburg ordinance passes this test as it is content

neutral and only regulates "where some speech may occur" – it may not occur under the windshield wipers or anywhere on vehicles parked on the public street, and left open all of the traditional methods of communication. *Jobe*, 409 F.3d at 267-270.

Catlettsburg's ordinance "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Hill,* 530 U.S. at 723. "As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 503 U.S. at 726.

This Court then went on to specifically review the ability of the speakers to distribute handbills, noting that denying such ability is more serious. *Hill* found that the eight foot approach restriction to unwilling recipients did "not prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. **And, as in all leafletting situations, pedestrians continue to be free to decline the tender.**" [Emphasis added] *Hill*, 530 U.S. at 727.

The Catlettsburg ordinance does not in any fashion serve to stop or limit a handbiller's message – it, in the words of this Court in *Hill*, 530 U.S. at 731, " . . . merely regulates the places where communications may occur." As this Court noted in *Hill*, 530 U.S. at 729, "A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."

The "bright line" rule in *Jobe* holds that communications may occur under the windshield wipers or on private motor vehicles parked on public property only with the owner's permission. *Jobe*, 409 F.3d at 273. The Sixth Circuit in *Jobe* correctly concluded that the person responsible for the unwanted paper on the vehicles and streets of the city is the person who placed it there.

D. The Sixth Circuit Decision Preserved the Owner's Rights to Their Private Property.

This Court, even while rejecting a ban on the use of the sidewalks around the Supreme Court building itself, noted "We have regularly rejected the assertion that people who wish to 'propagandize protests or views have a constitutional right to do so whenever and however and wherever they please'." *U.S. v. Grace*, 461 U.S. 171, 178-179 (1983) "The Government, '**no less than a private owner of property**, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" [Emphasis added] *U.S. v. Grace*, 461 U.S. at 179.

"We reject that the validity of the city's esthetic interest had been compromised by failing to extend the ban to private property, reasoning that the 'private citizen's interest in controlling the use of his own property justifies the disparate treatment.'" *City of Ladue*, 512 U.S. at 50, citing *Taxpayers for Vincent*, 466 U.S. at 811.

The Sixth Circuit noted: "A windshield wiper is not a communications device and has never taken on the trappings of one. . . . Unlike a telephone, a mailbox, a computer or the well-trodden path to the front door, the

windshield wiper does not exist, formally or informally to encourage communication." *Jobe*, 409 F.3d at 227.

This Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). A person's private automobile is not similar in any fashion to a shopping mall, was never designed to be used as a communication device, nor does its presence on the public way transform it from private property into a public forum for others.

This Court in *Lloyd*, 407 U.S. at 569, noted that "nor does property lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd*, 407 U.S. at 570, when discussing privately owned shopping centers, noted "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights."

Nowhere is the leap from completely private ownership to a public forum under the First Amendment made except in *Krantz*, 160 F.3d 1214.

E. Only the Sixth Circuit Correctly Balanced the Rights of Handbillers with the Rights of Those Willing to Receive Them.

The City of Catlettsburg's 1952 ordinance on how handbills may be disseminated has its genesis in the First Amendment cases of the late 1930's and early 1940's which dealt with restrictions on door to door solicitations and traditional handbilling on city streets. Handbilling or

leafleting, with its proffer and acceptance, has long been protected by this Court as an important aspect of free speech. *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943); *Lovell*, 303 U.S. at 444.

This Court has zealously guarded handbilling as one of the most traditional of American methods to set forth one's ideas; however, it has repeatedly stated that this is "Freedom to distribute information to every citizen ***wherever he desires to receive it*** . . . " and that "the dangers of distribution can so easily be controlled by traditional legal methods, ***leaving to each householder the full right to decide*** whether he will receive strangers as visitors . . . " [Emphasis added] *Martin*, 319 U.S. at 146-147.

This Court has always been adamant that traditional handbilling cannot be abridged: "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street ***from handing literature to one willing to receive it.***" *Schneider*, 308 U.S. at 162. "The right recognized in *Schneider* is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground." *Taxpayers for Vincent*, 466 U.S. at 809-810.

This Court has never forced the receipt of the proffered communication on an unwilling or unresponsive person. This Court recently validated the long held right of persons to be "let alone" when imposing reasonable restrictions on leafleting in *Hill*, 530 U.S. at 703. The Eighth

Circuit in *Krantz* completely missed the point that while one side of the free speech is the right to put forth one's views, the other side is that the intended recipient has the right to decide to receive *or* to decline to receive such communication. Only when the passerby *accepts* the proffer may the handbiller complete the dissemination of his or her ideas. A handbiller does not have a "right" to force the handbill in the pocket or hands of a non-responsive passerby. *Hill*, 530 U.S. at 718.

This Court's discussion of the right of privacy in *Watchtower Bible and Tract Society of N.Y. v. Village of Stratton*, 536 U.S. 150, 168 (2002), where the complained of ordinance did allow for "No Solicitation" signs on houses, validated the section of the ordinance " . . . which provides for the posting of 'No Solicitation' signs and which is not challenged in this case, **coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors**, provides ample protection for the unwilling listener." [Emphasis added] "We have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.'" *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). " . . . in striking down a complete ban on handbilling, we spoke of a right to distribute literature only 'to one willing to receive it'." *Frisby*, 487 U.S. at 485.

"There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Schneider*, 308 U.S. at 162. The Catlettsburg ordinance does just this – it prohibits litter: the placing of items on private personal motor vehicles, when the owner has not consented in advance to such placement. It even goes beyond what could be required.

As this Court noted in *Taxpayers for Vincent*, 466 U.S. at 809, "The rationale of Schneider is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed."

Like the persons who place signs on light poles, handbillers are usually long gone when the owners of the vehicles reappear to find their vehicles festooned with fliers, where they "remain unattended until removed."

Nothing in the Catlettsburg ordinance prohibits handbillers from placing handbills on the vehicles of those "willing to receive them." All those "willing" need do is provide a writing showing that they are indeed "willing" – willing to accept the handbill as well as the duty to dispose of it when they are done. To assume otherwise is to force those who are silent and unwilling to accept ideas forced on them and force them to dispose of the chosen method of communication.

F. The Sixth Circuit Decision Left Open Ample Alternative Channels of Communication.

Handbillers in Catlettsburg retain their constitutional right to go door to door with handbills and messages, which this Court recently reaffirmed in *Village of Stratton*, 536 U.S. at 150. Handbillers also retain the ability to stand on the street and hand flyers to all who would accept them. *Schneider*, 308 U.S. at 147. *Jamison v. State of Texas*, 318 U.S. 413 (1943). In Catlettsburg, the

handbiller could stand beside the vehicles and proffer the handbills to the drivers as they approached their vehicle, as there is no restriction in the Catlettsburg Ordinance on approaching a person, which restriction the Supreme Court found constitutional in *Hill,* 530 U.S. 551.

Handbillers also retain the ability to place signs on their own property. *City of Ladue*, 512 U.S. at 43. There this Court found a ban on almost all residential signs violated the First Amendment. The signs, however, were intended to be placed there by the owners of the property or with their permission. At no point did this Court mandate that others may place the signs without the owner's permission. Even if "residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *City of Ladue,* 512 U.S. at 57.

The "poorly financed causes of little people"[2] in Catlettsburg retain all of the traditional methods for dissemination of ideas. They even have the non-traditional right to place handbills on personal autos when the owners have given their written permission to accept the proffer. As such, the Catlettsburg ordinance fully meets not only the letter but the spirit of the constitutional right to handbill. What handbillers do not have is the right to trespass on a person's private property to turn it into their personal bulletin board. Catlettsburg could have chosen to preclude all handbills on vehicles. It did not do so.

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[2] *Martin*, 319 U.S. at 146.

This Court has never transformed a person's private vehicle into a public forum. This Court has never forced an indifferent passerby to accept a handbill forced on them. Nor has it shifted the burden to dispose of handbills where the passerby is silent. It should not do so now.

CONCLUSION

The Sixth Circuit decision correctly balanced the rights of the city to control litter and the right of private vehicle owners to keep their personal property litter free, with the First Amendment right of Leonard Jobe to place leaflets on private vehicles when the owners had expressed their willingness to receive them in writing.

The guidance of the *Hill* decision on handbilling and the right of intended recipients to be "left alone" was not available to the Eighth Circuit when deciding *Krantz*. The right of the city to regulate litter as discussed in *Taxpayers for Vincent* was not properly taken into account by the Eighth Circuit nor did it explain the transformation from private vehicle to public forum simply because the vehicle was parked on the public way.

For all these reasons, the City of Catlettsburg respectfully requests that this Court deny the petition for a writ of certiorari, as *Jobe* was correctly decided.

Respectfully submitted,

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